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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 244

FRANCIS M. ELMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 20–40; R. II, 8–28) [1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1959 (R. II, 29). On June 27, 1959, Mr. Chief Justice Warren granted an extension of time

[1] Vol. I of the record is the appendix filed by the petitioner in the court of appeals, and will be referred to without the prefix "I". Vol. II of the record consists of proceedings in the court of appeals, the notice of appeal, and a copy of the docket entries in the district court; this volume will be cited with the prefix "II". We have also supplemented the record by filing the trial transcript referred to by the prefix "Tr" and also by filing certain of the original Government Exhibits all of which were available to the court of appeals.

to file a petition for a writ of certiorari to and including July 27, 1959 and the petition was filed on July 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is a false statement to certify to Commodity Credit Corporation the delivery of straight grain where mixed grain is supplied, and where the certification form provides a space for indicating the percentage of mixed grain delivered.

2. Whether a willful conversion of fungible grain belonging to the Commodity Credit Corporation, and subsequent replacement prior to a demand for delivery, is an offense under 15 U.S.C. 714m(c).

3. Whether certification to the Commodity Credit Corporation that grain purchased will be used in the future only for feed is a false statement under 15 U.S.C. 714m(a), if at the time of certification there is no intention to comply.

STATUTES INVOLVED

62 Stat. 1070, as amended by 63 Stat. 154 (15 U.S.C. 714) provides:

> For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibers (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities, there is hereby created a body corporate to be known as Commodity Credit Corporation (hereinafter

referred to as the "Corporation"), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture (hereinafter referred to as the "Secretary").

62 Stat. 1072 (15 U.S.C. 714c) provides in part:

> In the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to the Government Corporation Control Act * * * the Corporation is authorized to use its general powers only to—
>
> (a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations.
>
> * * * * * *
>
> (d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities.
>
> * * * * * *

62 Stat. 1074, as amended by 70 Stat. 783 (15 U.S.C. 714m) provides in pertinent part:

> (a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation or for the purpose of obtaining for himself or another, money, property, or anything of value, under this Act, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.
>
> * * * * * *

(c) Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, or any property mortgaged or pledged as security for any promissory note, or other evidence of indebtedness, which the Corporation has guaranteed or is obligated to purchase upon tender, shall, upon conviction thereof, if such property be of an amount or value in excess of $500, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both, and, if such property be of an amount or value of $500 or less, be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

(d) Whoever conspires with another to accomplish any of the acts made unlawful by the preceding provisions of this section shall, upon conviction thereof, be subject to the same fine or imprisonment, or both, as is applicable in the case of conviction for doing such unlawful acts.

* * * * *

STATEMENT

The petitioner was convicted on 25 of 30 counts charging various violations of the Commodity Credit Corporation Charter Act, 15 U.S.C. 714m (R. 1-17, 380). He received a general sentence of 18 months on all counts (R. 401; II, 2-3). The court of appeals unanimously affirmed the conviction (R. II, 8-28).

A. *Counts charging false statements in selling grain to farmers under 15 U.S.C. 714m(a).*

Counts 1, 2, 6, 7, 9 and 11 charged the petitioner with falsely certifying to the Commodity Credit Corporation that various farmers obtained certain quantities of grain (R. 1–7).

Under the 1954 emergency feed program, the federal government in drought areas in South Carolina assisted farmers to obtain feed for their livestock (R. 166). Eligible farmers were issued a "farmer's purchase order" (R. 166; *e.g.* R. 44–46). Assistance was given on the basis of straight grain (R. 167). The grain dealer was required to certify on the "farmer's purchase order" either the quantity of straight grain or the eligible percentage of straight grain contained in the mixed feed delivered (R. 168–169). The dealer, in turn, obtained a "dealer certificate" based upon the certification on the "farmer's purchase orders" (R. 169). The "dealer certificate" could either be negotiated for cash face value or submitted to the Commodity Credit Corporation for surplus grain (R. 169–170). All "dealer certificates" are ultimately redeemed by the Commodity Credit Corporation for surplus grain (R. 170).

The petitioner was manager of the Elmore Milling Company (R. 103). He had attended a meeting in Columbia, South Carolina, where the purchase orders were explained (R. 172–173, 279). On each farmer's purchase order in Counts 1, 2, 6, 7, 9 and 11, the petitioner certified that only straight and no mixed grain was supplied (Govt. Ex. 7, 8, 10, 6, 11 and 4). Each farmer involved in these counts testified he did not get the straight grain certified (R. 27–28, 36, 25, 41,

20–21). The petitioner claimed that, except for the farmer involved in Counts 1 and 2, whom he never met (R. 247–248), all the others involved in these counts received the straight grain as certified and that he then mixed it for them (R. 254, 255, 256–257, 259–260).

On this series of charges, the jury convicted the petitioner on Counts 1, 2, 6, 7, 9 and 11 and acquitted him on Counts 3, 4, 5, 8 and 10. (R. 380).[2]

B. *Counts charging stealing and converting grain owned or pledged to Commodity Credit Corporation under 15 U.S.C. 714m(c).*

Counts 12 through 28 charged the petitioner with stealing, removing, disposing of, and converting to his own use grain owned or pledged to the Commodity Credit Corporation (R. 7–15).

In addition to being connected with the Elmore Milling Company, the petitioner was the manager of the Eastern Carolina Farmers Cooperative Association (R. 103). As such, he was manager of the Florence, South Carolina, Warehouse 1227–G, which had a storage agreement with the Commodity Credit Corporation (R. 83–85). Under the terms of this agreement, the Corporation stored with the warehouse certain wheat, which was owned or pledged to it, with the understanding that the warehouse would maintain, at all times, stocks of equal grade and quantity with that stored by the Corporation (R. 83, Govt. Ex. 21, section 7).

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[2] The printed record, at p. 380, indicates an acquittal on Count 2, but this is clearly a typographical error. See Transcript p. 772.

Mr. Vernon K. Gimson, Special Agent with the Department of Agriculture, testified that he had made an audit of the inventory of the warehouse (R. 54–55). He found that, on each date specified in Counts 12 through 28, the petitioner had shipped wheat from the warehouse consisting in whole or part of wheat owned by or pledged to the Commodity Credit Corporation (R. 60–69). All the wheat removed was later replaced (R. 78). The bookkeeper testified she kept a separate record, at petitioner's request, of these sales and replacements (R. 104). None of these transactions was reflected in the daily inventory record of the Association (R. 107), as there were no warehouse receipts to cancel for the withdrawals (R. 107–108, 126–127). The Association received no service charge for these transactions, and there was testimony that it received no profit that may have been made on these sales (R. 106–107).

The petitioner claimed that in shipping the wheat his primary interest was to make some money for the Association (R. 271, 275). On some of the transactions, he claimed the Association received a third of the profit and he received two-thirds (R. 275). The petitioner admitted writing a letter stating that he was aware of Section 7 of the storage agreement—relating to the maintenance of stocks of equal grade and quantity with that stored by CCC—and therefore had cancelled warehouse receipts for every bushel of wheat sold (R. 316).

On these counts, the trial judge charged in part (R. 363–364):

Conversion may include misuse or abuse of property. It may reach use in any unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Wheat rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached for embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.

Now in enacting this statute, Congress did not intend to eliminate intent from the offense. In other words, in order to violate any federal statute you have got to have a criminal intent; you have got to have an intent to violate the law. And that is one of the issues you have to decide in this case.

I charge you that where the taking is open and there is no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which must be repelled—which must or may be repelled by clear and convincing evidence before a conviction is authorized.

Therefore, the question of intent and what the defendant in this case intended by his actions is a question of fact for you to determine

on all of the facts and circumstances in the case.

Now with reference to that same statute, I charge you that if you find from the evidence in this case that wheat belonging in whole or in part to the Commodity Credit Corporation was removed from the Eastern Carolina Farmers Cooperative Association Warehouse by the defendant Francis M. Elmore without authority with intent to convert it either temporarily or permanently to the use of himself or the Eastern Carolina Farmers Cooperative Association, then the defendant Francis M. Elmore is guilty of the offenses charged in Counts 12 through 28, whether or not a profit was made, either for himself, the Elmore Milling Company, or the Eastern Carolina Farmers Cooperative Association, and also whether or not the wheat so taken was replaced or not replaced by anyone of any type or grade.

The jury convicted the petitioner on all the counts of stealing and converting, Nos. 12 through 28 (R. 380).

C. *Counts charging false statements in purchasing grain, and conspiracy, under 15 U.S.C. 714m(a) and (d).*

Counts 29 and 30 charged the petitioner's brother, Thomas H. Elmore, with false statements in the purchase of restricted feed wheat (Tr. 8–9).[3]

Count 31 charged the petitioner with falsely certifying to the Commodity Credit Corporation, when

[3] We have not included the detailed evidence as to these counts since Thomas H. Elmore did not appeal. The transactions involved in these counts, however, are part of the conspiracy charges, discussed *infra*.

he purchased 4,200 bushels of wheat, that it would be used for livestock and poultry feed (R. 16). Count 32 charged the petitioner and his brother Thomas H. Elmore with conspiring to make false statements to the Commodity Credit Corporation when purchasing wheat to be used as feed (R. 16–17).

Mr. D. Felder Huffman was the office manager of the Calhoun County Agriculture Stabilization and Conservation Office (R. 187). He accepted a bid from petitioner for the 4,200 bushels of wheat involved in Count 31 (R. 16–17, 187). He told the petitioner the wheat would have to be sold for feed wheat (R. 188). The feed certificate signed by the petitioner stated in part (R. 192–193, Gov't. Ex. 60):

> Feed certificate. The undersigned purchaser has purchased the commodity described below from the stocks of Commodity Credit Corporation with the understanding that such commodity will be utilized as feed for livestock or poultry, and hereby certifies that he will use the commodity for such purpose, or if sold to another person will obtain from such person a certificate that the commodity will be used for such purpose. It is understood by any signatory hereto that the price charged for the commodity was based on the condition that it should be utilized as feed and that its use for human food or unrestricted entrance into trade channels would impair certain price support programs administered by the U.S. Department of Agriculture. Any signatory hereto causing or permitting the use of any part of such commodity as human food or unrestricted entrance into trade channels agrees that he will

> pay to Commodity Credit Corporation the below-indicated unit price adjustment for each such unit so used or entered.

This wheat was delivered to the warehouse of the Eastern Carolina Farmers Co-operative (R. 190). All the wheat sold from the warehouse was for human consumption (R. 198, 93, 97).

The petitioner claimed that this wheat was sold to one Poplin (R. 262) from whom he received a letter stating that use of the wheat would be confined to animal feed, but the letter was burned up in a fire (R. 290). Gimson testified that the petitioner had told him that he did not read the restricted certificate when he signed it, and that the wheat was delivered to the Statesville Milling Company (R. 336), a flour mill (R. 98).

Counts 29 and 30 involved restricted feed wheat similarly purchased by Thomas H. Elmore and used to replace wheat sold from the warehouse (R. 109–111, 143, 152, 158, 163–164, 199, 208–209, 264–266, 334) and together with Count 31 form the basis of the conspiracy count—No. 32 (R. 16–17). The jury convicted the petitioner on Counts 31 and 32 (R. 380).

ARGUMENT

Any one of the twenty-five counts on which petitioner was convicted will support the eighteen month sentence which he received. *Emspak* v. *United States*, 349 U.S. 190, 195, fn. 9; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, fn. 1; see also *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*,

353 U.S. 53, 59, fn. 6. Actually, the convictions on all counts are valid.

1. The first group of counts charged the petitioner with making false statements in certificates to the Commodity Credit Corporation in connection with the sale of feed grain to farmers under emergency provisions in force in a drought area. The petitioner challenges his conviction on these counts[4] by claiming, despite a jury verdict, that his statements were not false, but true, or if not technically true, "substantially true" (Pet. 5, question 6). The evidence refutes the petitioner's contention.

Under the emergency program, eligible farmers were supplied with a government form called a "Farmer's Purchase Order." This form could be used to aid the farmer in the stricken area obtain basic food supplies for his stock. When the dealer supplied grain under these purchase orders, he could certify the amount and mixture on the forms and then trade them for a dealer's certificate which in turn was redeemable in full by the Commodity Credit Corporation on the basis of the straight surplus grain delivered. The form clearly provided spaces to certify either the delivery of a percentage of straight grain in mixed feed or for delivery of only straight grain (see Govt. Ex. 4, 6, 7, 8, 10 and 11).

In each of these counts upon which the petitioner was convicted, he certified that only straight grain was delivered (see the Statement, *supra*, p. 5). In

[4] Present counsel for the petitioner recognizes that the point here presented was not properly preserved in the trial court as to these counts (Pet. 7-8).

none of these instances did the farmer involved obtain only the straight grain as certified. Petitioner argues that he either sold the farmer straight grain and then mixed it (Pet. 8) or "at least that the Government did not prove that the farmers did not so receive it" (Pet. 19). The references to the refuting evidence are set out in the Statement, *supra*, pp. 5–6. Here it suffices to note that the farmer in Count 9 testified that "I never got no grain at all" (R. 41), while the petitioner certified he received 800 pounds of straight grain (Govt. Ex. 11), and the farmer involved in Count 7 testified he received 600 pounds of grain (R. 25) while the petitioner certified he received 2,000 pounds of straight grain (Govt. Ex. 6).

The least that can be said of this direct unequivocal evidence is that it presented a conflict with petitioner's testimony—a conflict which was resolved by the jury verdict against him.

2. The second series of counts, 12–28, charged the petitioner with stealing and converting government grain. The petitioner admits selling grain pledged to Commodity Credit Corporation (Pet. 9), as indeed he must when confronted by both the detailed uncontroverted audit of grain inventory prepared by Mr. Gimson, the investigator, and the corroborating separate record kept at the request of the petitioner by a bookkeeper. As to these counts, the petitioner contends only that it was no crime to sell government wheat unless there was an unfulfilled government demand for delivery, and that since he replaced the stolen grain there was no criminal intent to convert.

The crime defined in the statute must be considered in context. The Commodity Credit Corporation has

for one of its purposes the stabilizing of farm prices, 15 U.S.C. 714, and in order to accomplish this end, it is specifically authorized to support prices by loans and purchases (15 U.S.C. 714c (a)). It therefore is of prime importance to the program that the stored grain not reach the open market. Hence, the storage agreement specifically provided for maintaining the quantity and quality of the stored grain in the warehouse (Govt. Ex. 21, section 7, *supra*, p. 6). Against this background, it is plain that, once the stored government grain was sold by the petitioner, the crime of conversion or removing or disposing was complete—*i.e.* once the grain was put on the open market, the purpose of the government storage was destroyed.

In this light, *Hartford Accident and Indemnity Company* v. *State of Kansas*, 247 F. 2d 315 (C.A. 10), which petitioner claims is in conflict, is not applicable. The *Hartford* case stands for the proposition that, before there arises a duty to pay for stolen or converted grain, there must be a demand which is dishonored. 247 F. 2d at 321. But, as we have pointed out, the criminal statute under which the petitioner was charged is ultimately concerned with keeping grain off the market. The pecuniary loss to the government, such as was involved in *Hartford*, is handled separately. This type of criminal statute is primarily to protect the proper administration of the government program. See *United States* v. *Gilliland*, 312 U.S. 86, 93.[5]

[5] In other criminal cases under this statute, where a demand was made, the decisions do not make demand an element of

This overall purpose of the Commodity Credit Corporation's program is also the basis for holding that the petitioner's intention to replace the grain is irrelevant. Replacement of the grain did not affect the loss occasioned to the program by putting the grain on the market. The trial judge was therefore clearly correct in charging the jury that, if the grain was intentionally converted, the petitioner was guilty regardless of whether the wheat was replaced (R. 364). See also *Slaten* v. *United States*, 209 F. 2d 590, 592 (C.A. 5).

Complaint is also made of one sentence in the charge which was a paraphrase of this Court's statement on conversion in *Morissette* v. *United States*, 342 U.S. 246, at 272 (Pet. 15). When this part is read in context, it is clear that the jury could not have been misled as to the necessity of a criminal intent, because in the very next paragraph the trial court unmistakably instructed (R. 363–364):

> Now in enacting this statute, Congress did not intend to eliminate intent from the offense. In other words, in order to violate any federal statute you have got to have a criminal intent; you have got to have an intent to violate the law. And that is one of the issues you have to decide in this case.

3. Counts 31 and 32 involve the charge of false statements in purchasing feed grain from the Commodity Credit Corporation and a conspiracy between

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the offense of conversion. *Marteney* v. *United States*, 218 F. 2d 258 (C.A. 10), certiorari denied, 348 U.S. 953; *Shannon* v. *United States*, 209 F. 2d 885 (C.A. 5), certiorari denied, 347 U.S. 952; *Henderson* v. *United States*, 203 F. 2d 81 (C.A. 5).

petitioner and his brother to make false statements in so purchasing.

As part of the agriculture program the government sold wheat which was restricted to be used as feed, rather than for human consumption. The petitioner admits that some of this purchased feed wheat was used to replace the all-purpose wheat involved in the conversion counts (Pet. 9–10). But his claim is that when he certified to the government that the wheat would be used as feed, while it was actually not used as feed, it was merely a promise as to the future and thus not a crime. He relies on *Chaplin* v. *United States*, 157, F. 2d 697 (C.A.D.C.), involving the common law crime of false pretenses as applied to the future use of money; under the technical rules relating to that common law crime, a promise as to future use was held not to constitute false pretenses. Of like import is *Bonney* v. *United States*, 254 F. 2d 392 (C.A. 9). Whatever their validity, those decisions are not applicable to this case. The crime here is not a common law crime, and there is no occasion to read into it those nice distinctions of the common law. The petitioner was charged, not merely with making a false statement as to the future use of the grain, but also with making the knowingly-false statement in order to influence the Corporation to sell him the grain. In statutes punishing false statements to induce governmental action, it has consistently been held that a knowingly-false present statement as to future use or future action is punishable. *United States* v. *Rubinstein*, 166 F. 2d 249, 255 (C.A. 2), certiorari denied, 333 U.S. 868; *Corcoran* v.

United States, 229 F. 2d 295, 299 (C.A. 5); and compare the Ninth Circuit's *Bonney case, supra*, with such other Ninth Circuit cases as *Todorow* v. *United States*, 173 F. 2d 439, certiorari denied, 337 U.S. 925, and *McCoy* v. *United States*, 169 F. 2d 776, certiorari denied, 335 U.S. 898; see also under the mail fraud statute, *Durland* v. *United States*, 161 U.S. 306.

The reason for this consistent interpretation becomes evident from the facts of this case. The government is induced to sell grain at a cheaper rate only because of the promise by the purchaser to use it in restricted fashion. In fact, the certificate so states (Govt. Ex. 60, *supra*, p. 10). If a knowingly-false statement as to intended use were not punishable, the farm price support program could be too easily sabotaged.[6]

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1959.

[6] The petitioner also states that the court below was mistaken in saying that the 4200 bushels of Calhoun wheat were delivered to a mill in North Carolina (Pet. 17). However, Mr. Gimson testified that the petitioner told him the Calhoun wheat was delivered to the Statesville Milling Company (R. 336), which is located in Statesville, North Carolina (R. 98).

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